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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

Date: MAY 14 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed an untimely appeal that was treated as a motion to reopen/reconsider by the director. The director denied the motion as well. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was a provider of healthcare services. It sought to employ the beneficiary permanently in the United States as an occupational therapist. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possesses an advanced degree or a foreign equivalent degree or in the alternative a United States baccalaureate degree or a foreign equivalent degree and at least five years of post-baccalaureate experience in the specialty as required by 8 C.F.R. § 204.5(k)(3)(i).

On appeal, counsel asserted that the beneficiary's three-year diploma from the Colegio Universitario de Los Teques in Caracas, Venezuela is the foreign equivalent of a four-year United States bachelor's degree. Counsel included copies of previously submitted documentation in support of the appeal.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

As one of two threshold issues in these proceedings, it must first be determined whether the petitioner, [redacted], is an inactive business. Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

The AAO issued a Notice of Intent to Dismiss (NOID) to counsel and the petitioner on January 19, 2012, informing the parties that a review of public records on the website at http://sdatcert3.resiusa.org/UCC-Charter/searchByName_a.aspx?mode=name revealed that the petitioner, [redacted], was not in good standing and its status had been "forfeited" in the state of Maryland for failure to pay a penalty in 2007 and failure to a file a property return in 2008. The website was accessed on December 30, 2011 and again on April 20, 2012.

The AAO informed the parties that if the petitioner was no longer an active business, the petition and its appeal to this office have become moot. In which case, the appeal shall be dismissed as moot. Therefore, the AAO requested that the petitioner, [redacted] provide a current certificate of good standing or other evidence demonstrating that the petitioning business is not inactive and had current business activity.

In response, counsel submits a statement in which he claims that the petitioner, [redacted] Services, Inc., was no longer in business because it had been "absorbed" by the business entity, [redacted], on February 1, 2009. Counsel notes that the business entity [redacted] Inc., has assumed all of the liabilities of the original petitioner, [redacted] Services, Inc., and that the business entity [redacted], was the new petitioner in these proceedings.

The only way for a different business entity to be able to use a labor certification approved for a particular petitioner as the employer is if that business entity establishes that it is a successor-in-interest to that petitioning predecessor and employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). A labor certification is only valid for the particular job opportunity and area of intended employment described therein. 20 C.F.R. § 656.30(c)(2).

A successor business entity may establish a valid successor relationship to the petitioning predecessor for immigration purposes if it satisfies three conditions. First, the successor business entity must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor petitioner and employer. Second, the successor business must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor business entity must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the successor to the petitioning predecessor must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage to the beneficiary. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership from the petitioning predecessor forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

In support of the claim that the business entity, [redacted] Inc., is a successor-in-interest to the petitioner, [redacted], counsel submits a copy of a contract dated

August 25, 2008 between the petitioner, [redacted] Services, Inc., and the District of Columbia Public Schools with "Contract No: [redacted] and "Solicitation No: [redacted] The original contract related to the provision of services to the District of Columbia Public Schools Office of Special Education by occupational and physical therapists employed by the petitioner, [redacted] Services, Inc., from August 25, 2008 to September 30, 2008, with subsequent modifications extending the terms of the contract. However, the record is absent any relevant and corresponding evidence demonstrating that the business entity [redacted] Services, Inc., had assumed the position of the petitioner, [redacted] Services, Inc., as successor in the contract with the District of Columbia Public Schools Office of Special Education for the provision of services by occupational and physical therapists.

Counsel submits two separate affidavits both signed by [redacted] dated December 30, 2009 and December 31, 2009, respectively, as well as a board resolution of the business entity [redacted], dated January 11, 2010, that is also signed by [redacted]. In these documents, [redacted] indicates that he is the chief executive officer of the business entities, [redacted] and [redacted], as well as the secretary of the business entity [redacted] notes that the business entity, [redacted] had assumed all immigration related liabilities, obligations and undertakings of the petitioner, [redacted]., as part of a transfer of employees executed in an "Asset Purchase Agreement effective January 1, 2010" between the business entity, [redacted] and the petitioner [redacted] asserts that the business entity, [redacted] had assumed all immigration related liabilities, obligations and undertakings of the business entity, [redacted], as part of a transfer of employees executed in an "Asset Purchase Agreement effective January 1, 2010" between the business entity, [redacted], a parent company of the business entity, [redacted], and the business entity, [redacted]. However, the record is absent any direct evidence establishing the transfer of the assets and liabilities of the petitioner, [redacted]., to any business entity as a valid successor, whether it be the business entity, [redacted] or the business entity, [redacted], or the business entity, [redacted]

Both counsel and Suresh Doki assert that the petitioner, [redacted], has been succeeded-in-interest by another business entity without providing any evidence to corroborate their assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is noted that approved labor certifications are not articles of commerce that can be sold, bartered, or purchased. 20 C.F.R. § 656.12(a).

In addition, the statements of counsel and [redacted] regarding which specific business entity is the successor-in-interest to the petitioner, [redacted] Services, Inc., are inconsistent and in conflict.

While counsel claims that the business entity [redacted], is the successor to the petitioner, [redacted] contends that the petitioner, [redacted], was succeeded by the business entity, [redacted] which in turn was succeed by the business entity, [redacted] as a result of an "Asset Purchase Agreement effective January 1, 2010" between the business entity, [redacted] a parent company of the business entity, [redacted] and the business entity, [redacted]. The record is absent any explanation for these discrepancies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, it has not been credibly established that the petitioner, Atlantic Health Services, Inc., has been succeeded-in-interest by any business entity.

The evidence in the record establishes that the petitioner, [redacted], was no longer an active business and is without a successor. Consequently, the appeal must be dismissed as moot. The certified job opportunity no longer exists.

As the second of the two threshold issues in these proceedings, it must be determined whether a valid job opportunity exists as certified by the DOL. In the NOID dated January 19, 2012, the AAO noted that a review of public records on the website at http://corp.dcra.dc.gov/WebSearch.aspx, revealed that the petitioner's status had been "revoked" in the District of Columbia. The job opportunity is in the District of Columbia. The website was accessed on December 30, 2011 and again on April 20, 2012.

The regulation at 20 C.F.R. § 656.30(c)(2) states in pertinent part:

> A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and for the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750)....

Area of intended employment is limited by definition in 20 C.F.R. § 656.3 as "the area within normal commuting distance of the place (address) of intended employment." *See Matter of Sunoco Energy Development Company,* 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment).

In the instant case, the petitioner, [redacted] c., indicated that the primary worksite for the offered job was the [redacted] Washington D.C., at Part H items 1 and 2 of the ETA Form 9089. The DOL subsequently certified this location as the area of intended employment. The fact that the petitioner's status has been revoked by the District of Columbia and the petitioner cannot conduct business in the District of Columbia means that a valid job opportunity no longer exists. Therefore, the labor certification is no longer valid for the job

opportunity, and the visa petition may not be approved. The AAO must dismiss the appeal for this additional reason.

As noted by the director as the basis for denying the petition, the next issue to be examined in the instant proceedings is whether the beneficiary possesses an advanced degree or a foreign equivalent degree or in the alternative a United States baccalaureate degree or a foreign equivalent degree and at least five years of post-baccalaureate experience in the specialty as required by 8 C.F.R. § 204.5(k)(3)(i). In addition, the issue of whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification must be determined.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The ETA Form 9089, Part H set forth the minimum requirements for the position of occupational therapist. Part H, lines 4 and 4-B, of the labor certification reflects that a bachelor of science degree with a major in occupational therapy is the minimum level of education required. Lines 5, 5-A, and 5-B, reflect that 24 months of training in Sensory Integration and Praxis Test Certification are required for employment in the offered job. Line 6 reflects that 60 months of experience in the offered job of occupational therapist is required to fill the proffered position. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Line 14 reflects that an occupational therapist license is also required for employment in the offered job.

In Part J, line 11 of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is not a "Bachelor's," but instead is "Other." At line 11-A, where beneficiaries are asked to specify what the highest level of education achieved if the answer to line 11 was other, the beneficiary listed "Occupational Therapist License in the District of Columbia." At lines 12 through 16, the beneficiary indicated she achieved this highest level of education with the major field of study, "BA – Occupational Therapist Registered OTR/L," from the National Board For Certification In Occupational Therapy (NBCOT) in Gaithersburg, Maryland in 1999.

With respect to the beneficiary's educational credentials, the record contains a copy of the beneficiary's Spanish language (and corresponding certified English translation), Technico Superior en Salud Mencion: Terapra Ocupacional, or degree of Superior Technician in Health with Major in Occupational Therapy, from the Colegio Universitario de Los Teques in Venezuela. The record also includes the beneficiary's transcripts from the Colegio Universitario de Los Teques and

corresponding certified translations. A review of these documents reveals that the beneficiary's curriculum in achieving her Technico Superior en Salud Mencion: Terapra Ocupacional, or degree of Superior Technician in Health with Major in Occupational Therapy, from the Colegio Universitario de Los Teques consisted of three years of classes in 1990, 1991, and 1992.

The record contains a letter from [redacted] for the [redacted], who stated the following in pertinent part regarding the beneficiary and her qualifications:

> [The beneficiary] OTR is an internationally educated occupational therapist that graduated from College University de los Teques in Venezuela, which is a program recognized by the World Federation of Occupational Therapists (WFOT).
>
> ... (NBCOT) is the governing body that administers the Certification Examination for OCCUPATIONAL THERAPIST REGISTERED OTR®.
>
> The WOFT is an International organization, which has set worldwide standards for occupational therapy educational programs. Educational programs in the US, which are accredited by the American Occupational Therapy Association, have met the standards of WFOT.
>
> For US graduates, the minimum educational requirement for certification as an OCCUPATIONAL THERAPIST REGISTERED is a baccalaureate degree, a post-baccalaureate certificate, or an entry level master's degree in occupational therapy. The NBCOT accepts a diploma from a WFOT approved school as meeting the degree or certificate requirements in order to sit for the Certificate Examination.
>
> The NBCOT recognizes that there are many educational systems around the world. Although the foreign system may be different, occupational therapy schools approved by WFOT have met common standards, which are acceptable to NBCOT. Therefore, the NBCOT accepts the professional education of an internationally educated occupational therapist as professionally equivalent to that of an occupational therapist that has graduated from a program in the US.
>
> The NBCOT reviewed [the beneficiary's] credentials and approved her to take the Certification Examination in OCCUPATIONAL THERAPIST REGISTERED OTR®. [The beneficiary] passed the Certification Examination and became certified as an OTR on April 30, 1999.

The record contains a copy of the 2008 Occupational Therapist Eligibility Determination Handbook from NBCOT which confirms the information provided by Ms. Boswell in her letter.

The record also contains an evaluation of the beneficiary's credentials that was signed by Sufei Li, Director of Educational Credential Evaluation, of The Knowledge Company. The evaluation notes

that the beneficiary "pursued a three-year full-time course of study with a major in Occupational Therapy" to receive the Technico Superior en Salud Mencion: Terapra Ocupacional, or degree of Superior Technician in Health with Major in Occupational Therapy, from the Colegio Universitario de Los Teques. The evaluation's conclusion states:

> According to the practice of National Board for Certification in Occupational Therapy, Inc., [the beneficiary's] Tecnico Superior from the Colegio Universitario de Los Teques is the professional equivalent of a degree from an accredited baccalaureate program in Occupational Therapy in the United States.

The evidence in the record establishes that the NBCOT allows an individual possessing a three-year bachelor degree from a WFOT approved foreign school as meeting the degree or certificate requirements in order to sit for the Certificate Examination for licensure as an occupational therapist working in the United States.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act,

provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather

than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Clearly, the standards set forth by the NBCOT allowing an individual possessing a three-year bachelor degree from a WFOT approved foreign school as meeting the degree or certificate requirements in order to sit for the Certificate Examination for licensure as an occupational therapist working in the United States are not the same standards for eligibility as an advanced degree professional under section 203(b)(2) of the Act. Because the beneficiary has neither (1) a U.S. master's degree or foreign equivalent degree in occupational therapy, nor (2) a U.S. baccalaureate degree or foreign equivalent degree in occupational therapy and five years of progressive experience in the specialty, she does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.[2]

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[2] We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed May 2, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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http://edge.aacrao.org/info.php (accessed May 2, 2012). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience. EDGE confirms that the degree held by the beneficiary, "technico superior," awarded by a university or university level institution (instituto or colegio universitario) in Venezuela represents attainment of a level of education comparable to 2 to 3 years of university study in the United States.

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

As discussed previously the beneficiary possesses a three-year degree, Technico Superior en Salud Mencion: Terapra Ocupacional, or degree of Superior Technician in Health with Major in Occupational Therapy, from the Colegio Universitario de Los Teques in Venezuela. The beneficiary does not have a four-year United States baccalaureate degree or a foreign equivalent degree and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. As noted *supra*, EDGE confirms that this degree is not equivalent to a U.S. baccalaureate. In addition, the beneficiary does not meet the job requirements on the labor certification.

Finally, beyond the decision of the director, even assuming that the business entity, [redacted] established that it is a successor-in-interest to the petitioner, [redacted], the business entity, [redacted] failed to demonstrate the ability to pay the proffered wage to the beneficiary in 2009 and 2010.

The petition is accompanied by an ETA Form 9089 certified by the DOL. The priority date of the petition is February 23, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is $49,500.00 annually.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the NOID issued on January 19, 2012, the AAO informed counsel and the petitioner that the record did not contain sufficient evidence establishing that the petitioner possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date of February 23, 2007. Therefore, the AAO requested that the petitioner provide complete federal tax returns or audited financial statements for 2007, 2008, 2009, and 2010. The AAO noted that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). However, the business entity, [redacted], the claimed successor to the petitioner, [redacted]., failed to submit any evidence demonstrating its ability to pay the proffered wage to the beneficiary in 2009 and 2010, despite the AAO's request to submit such evidence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.